

No. 12468

United States
Court of Appeals
for the Ninth Circuit.

HERBERT WINDSOR and BAEDA E. WIND-
SOR, husband and wife,

Appellants.

vs.

UNITED STATES OF AMERICA,

Appellee.

SUPPLEMENTAL
Transcript of Record

Appeal from the United States District Court,
Northern District of California,
Southern Division.

FILED

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the Southern Division of the United States
District Court for the Northern District of
California

WINDSOR,

Plaintiff,

vs.

YOSEMITE PARK & CURRY COMPANY

and

UNITED STATES OF AMERICA;

Defendants.

Before: HON. HERBERT W. ERSKINE,
Judge.

REPORTER'S TRANSCRIPT

Tuesday, July 12, 1949

Appearances:

For the Plaintiff:

PERRY P. YOHE, ESQ. and
CAMERON L. LILLIE, ESQ.

For the Yosemite Park & Curry Company:

M. B. JACKSON, ESQ.

For the United States:

DANIEL C. DEASY, JR., ESQ.,
Assistant United States Attorney.

(A motion to dismiss on behalf of the Yosemite Park & Curry Company was granted by the Court, after which the following proceedings were had:)

Mr. Lillie: Are you ready to proceed, Your Honor?

The Court: Yes.

Mr. Lillie: We have certain stipulations that the Government and the plaintiff will enter into. The Government has here a scale drawing of the place where the accident occurred which we would like to introduce in evidence as——

Mr. Deasy: This drawing is made by the Office of the Park Engineer at the Yosemite Park. The date is not on here, but it was made shortly subsequently to the occurrence of the accident, Your Honor. The drawing is in two sheets here, blueprints, and is of the place where the accident involved in this case occurred.

Mr. Lillie: We will stipulate that it may go into evidence as an exhibit, Your Honor.

The Court: It is a drawing.

Mr. Deasy: Yes; two sheets or blueprints.

The Clerk: That will be plaintiff's Exhibit No. 1.

(Two sheets of blueprints were thereupon marked Plaintiff's Exhibit No. 1 in evidence.)

The Court: What is the date of this alleged accident?

Mr. Lillie: June 21st, 1947. We also offer, Your Honor, six photographs showing and integrating different portions of the porch and the step from which the plaintiff fell as next exhibit in order.

Mr. Deasy: I might state these photographs were

also [2*] taken by the personnel of the National Park Service, Your Honor, at Yosemite.

The Court: They will be Plaintiff's Exhibit 2 through 7 in evidence.

(Six photographs referred to were thereupon marked Plaintiff's Exhibit No. 2 through 7 in evidence.)

Mr. Deasy: Counsel, will it be stipulated that at the conclusion of the case the Government may withdraw these exhibits?

Mr. Lillie: So stipulated.

Mr. Deasy: Also the next one which you are about to offer?

Mr. Lillie: Yes; we will also offer as the next exhibit in order for the plaintiff a contract—it is a copy of the contract between the Government and the Yosemite Park Company, I believe, who operated the concession.

(Copy of contract was thereupon received in evidence and Marked Plaintiff's Exhibit No. 8.)

Mr. Lillie: We will also offer and there is no objection to the offer, Your Honor, two letters addressed to Mrs. Windsor, the plaintiff, one dated October 11, 1947, from the Roslyn Medical Group, and the second one dated October 31st, 1947, from the Lewis Memorial Hospital at Yosemite National Park.

* Page numbering appearing at top of page of original Reporter's Transcript.

(Two letters, 10/11/47 and 10/31/47, respectively, were thereupon received in evidence and marked Plaintiff's Exhibits No. 9 and 10.) [3]

Mr. Lillie: The next exhibit is a little bulky, Your Honor. It is a replica of the step and the platform which the plaintiff now offers in evidence.

Mr. Deasy: This is offered for the purpose of illustration, is it?

Mr. Lillie: That's right; for the purpose of illustration.

Mr. Deasy: It is made by the plaintiff, is it?

Mr. Lillie: Mr. Windsor, who is in the United States government service, yes.

(Model referred to was thereupon marked Plaintiff's Exhibit No. 11 in evidence.)

The Court: What are those two letters? Do they deal with injuries?

Mr. Lillie: Yes, Your Honor. Instead of medical testimony, why, those letters are offered.

It is also stipulated between the Government and the plaintiff that if Mr. Cecil J. Doty, who is the regional architect for the Park Service Bureau, 180 New Montgomery, were called upon to testify, that he would testify that at the time of the accident in question and at the time the buildings were built there was in existence a building code adopted by the United States Department of the Interior for National Park Service and on that testimony we offer the building code in evidence.

Mr. Deasy: As to the code itself, Your Honor, I

enter into the stipulation with counsel as to what Mr. Doty would testify; [4] however, I object to the admissibility of the building code on the ground that no proper foundation has been laid and it is incompetent, irrelevant and immaterial as far as the defendant United States is concerned.

The Court: In what respect has not the foundation been laid if Mr. Doty would testify:

Mr. Deasy: My understanding is he would testify that this building code, copy of which has been offered in evidence, was in existence at the time and that it was used in connection with buildings at the Yosemite Park. But whether the matter has any statutory operation for it, or has any binding effect as though it were a regulation adopted under a statute of the United States, I am not familiar with that, Your Honor, never having heard of this code until recently.

Mr. Lillie: Might I call the Court's attention to the title on the outside of it. This is United States Department of Interior, National Park Service, recommended building code, revised August, 1935, report of building code committee.

The Court: I will overrule the objection and admit it.

(The building code was thereupon received in evidence and marked Plaintiff's Exhibit No. 12.).

Mr. Lillie: I might state to Your Honor that counsel for the government and the plaintiff have

stipulated that a progress report of a doctor who was a doctor in the city of San Francisco is to be forwarded to both of us by an uninterested third [5] party, the Yosemite Park Company. The plaintiff in this case was examined as of yesterday and when the progress report comes both counsel and myself have stipulated that it may be offered in evidence.

Mr. Deasy: For whatever it is worth to Your Honor. That is the report of the doctor employed by the Yosemite Park & Curry Company in recent days.

Mr. Lillie: Yes. I think the examination was yesterday.

Mr. Deasy: Yes, we have no objection to its being received in evidence.

Mr. Lillie: To facilitate the trial, if the Court has no objection, I should like to read into the record the pertinent portions of the building code that the plaintiff believes are pertinent to its case.

The first section is No. 3302. It is on page 186 of the building code, under chapter 33.

(Reading.)

The next section is Section 3305, on page 183 of chapter 33.

(Reading.)

The next portion is not material but we would like to call the Court's attention to Section 3306 of chapter 33 on page 183.

(Reading.)

The next section that plaintiff believes is pertinent, Your Honor, is Section 3307 of chapter 33, page 183.

(Reading.)

I should like to call the plaintiff, Mrs. Windsor.

BAEDA WINDSOR

the plaintiff, called in her own behalf; sworn.

Direct Examination

By Mr. Lillie:

Q. Where do you reside?

A. 118 Laurel Drive, Altadena, California.

Q. On or about January 21, 1947, do you recall an accident occurring——

The Court: You mean——

The Witness: June.

Q. June 21, 1947,—to you in Yosemite Park?

A. Yes.

Q. Will you tell the Court just what happened and the circumstances leading up to it?

A. My husband and son and I were on a vacation and we went to Yosemite, driving, and we arrived there in the evening, about dusk, or twilight, and we drove around for a while looking for a campsite, a place to stay, and it started to get darker.

My husband stopped in one place and inquired about some place for us to stay and spend the night. As it proceeded to get darker, we decided we better get something to eat. We hadn't had any dinner,

(Testimony of Baeda Windsor.)

so we drove over to what is called the Lodge, with the cafeteria. We went in there and had dinner.

After we had finished our dinner, my son went out ahead of us and my husband stopped to pay the bill and to pick up a little meat for our dog, who was in the car. Then I went out in front of [7] my husband and I walked across the platform toward the car and it was dark; it was very dark at that time and no lights out there.

The Court: What time of night was that?

A. It was about 8:00 o'clock.

The Court: All right.

A. When I came to the edge of the platform, ready to step down, something made me lose my balance, either the edge of the platform, some rough place, I couldn't see, and I lost my balance and I went to try to catch myself, I reached out instinctively for something to catch onto, and there was nothing there, no rail, no anything, and I stepped down first with my right foot and then quickly with the left, and as I stepped—at the bottom the bone in my left ankle cracked and there was a terrific pain shot through and I caught myself on the other foot in exactly the same sort of step and that cracked and then I went over into the gutter.

The Court: I am somewhat familiar with that Yosemite Lodge. There is a cafeteria there, a long porch.

Mr. Lillie: That is correct.

The Court: The lodge has a cafeteria and you

(Testimony of Baeda Windsor.)

walk in the door and go around by the cafeteria to get your meals and you come out and pay the cashier and then go out through the door and there is quite a broad porch there and people sit there and so forth; quite a long porch. [8]

Mr. Lillie: That is correct.

The Court: There is a rail on that. In the middle of it is a couple of steps down there onto the ground, as I recollect it. Is that what you were doing, going along that porch?

Mr. Lillie: I think, if the Court please, after the porch there is an extension of another platform and on that platform the cars park now. There are two steps down as indicated by the pictures.

The Court: Let me see the pictures. Referring to Plaintiff's Exhibit 4, that shows the porch that I had reference to, not the porch where you get into your car.

Mr. Lillie: That is correct.

The Court: The porch above there.

Mr. Lillie: Yes.

The Court: Which porch were you walking on, the porch above or the lower one there?

A. Well, the lower platform—I don't specially remember where I came down from toward, but it was on this platform that I angled across toward the car this way, over in this direction, as it was on this platform that I lost my balance, (indicating).

The Court: For the record, the witness pointed

(Testimony of Baeda Windsor.)

to that part of Exhibit 4 which shows the porch immediately above the words "Park for reservations."

Mr. Lillie: I show you two shoes, Mrs. Windsor. Are these the shoes that you were wearing? [9]

A. Those are the shoes I was wearing.

Mr. Lillie: May these be introduced in evidence?

(The pair of shoes referred to was thereupon received in evidence and marked Plaintiff's Exhibit No. 13.)

Q. (By Mr Lillie): Will you step down to Plaintiff's Exhibit No. 11 and indicate to the Court where you lost your balance and what occurred thereafter?

A. I think the cafeteria was over in this direction, and I walked over across the platform to here.

Q. Indicating the top portion of the Exhibit 11, the wooden portion?

A. Yes. That is where I lost my balance and there was nothing to catch and it was dark and I couldn't see and there was—that came out afterward—I couldn't see that there was a rough spot there. So that is where I lost my balance, and I came down with my right foot and tried to catch myself and then with my left foot; crossed that dark place and hit this uneven place on the gutter at the bottom.

Q. Whereabouts did your left foot hit the gutter, do you know?

(Testimony of Baeda Windsor.)

A. Yes. It was sort of bent right back, right in——

Q. Your foot hit here. Do you know what portion of it?

A. I hit about the center of the foot and the heel went back there.

Q. Into the ridge? A. Yes. [10]

Q. Indicated on the exhibit?

A. Yes. Then, of course, I caught myself quickly; I had to, quickly, and with very much force on the other one and then that cracked the right one.

Q. We have you where you have fallen to the ground, the pavement. Will you tell the Court what happened after that?

A. Well, I was suffering considerably from shock as well as the terrific pain in the ankles and for a moment I thought I was going to faint. I asked for some water. Someone brought me some water and my husband asked if I could get up. I said, "No, I can't move," and several other people came around. I was a little frightened for fear they were going to try to pick me up and I knew it was serious; I did not want to be moved, so I said, "Don't touch me until someone comes," and I don't know who called for the doctor and the ambulance but finally the doctor and the ambulance came and the doctor examined the ankles right there before he moved me and then they put me on the stretcher and in the ambulance and took me to the Lewis Memorial Hospital.

(Testimony of Baeda Windsor.)

There they took me into the room, into the receiving room, and Dr. Sturn, that was his name, and the nurse took X-rays and discovered the bone was broken in each ankle, and they painted the ankle and leg with some brown liquid, I don't know what it was, and put bandages on and then made up a plaster cast and covered all of it from the toes. They just left the toes sticking out, up to just below the knee on the plaster cast on both [11] legs.

Q. How long did you remain at the hospital?

A. Well, it was two nights and an extra day.

Q. What was your condition while you were there?

A. Well, it was very, very painful. They gave me some sedatives so that I could sleep and with both ankles involved, it was very difficult to move. I didn't move at all without the help of a nurse.

Q. By "moving" you mean moving in bed?

A. Yes, moving in bed. Of course, I was in bed.

Q. Then what occurred after the two days and the two nights in the hospital?

A. Then they put me in our car and the suffering was very great because the movement of the car would shake me and the ankles ached continuously all the way home; that took about 12 hours. We left there about 10:00 and arrived home about 9:00 in the evening.

Q. What occurred after you got home?

A. Well, when we got home, why, they carried me into bed and there I stayed for six weeks with

(Testimony of Baeda Windsor.)

the exception of an hour or so after the first few days. I stayed in bed right there. Then they got a wheelchair and we improvised a system, because we felt we could not afford two nurses, to lift me from one place to another; we worked out a sort of bridge from the bed to the wheelchair and I would turn myself with the help of the nurse [12] and would back across this little bridge onto the wheelchair so I could have a change of positions.

Q. How long were you in that condition, did you say six months? A. Yes, six months.

Q. During that period of time were the casts on your legs? A. They were on continuously.

Q. You could not walk?

A. Oh, no, I couldn't walk; I couldn't stand.

Q. Subsequent to that, what happened? What happened after that?

A. Well, before the six weeks were up, it was about two weeks after I came home, we had an X-ray technician come up to take some more X-rays to see how the bones were healing and they said that was satisfactory. Of course that was just the beginning of the healing process and then we continued on the same way for six weeks.

Q. After the six weeks what occurred?

A. Then my husband took me down in the car to Dr. Williams. He is the orthopedic surgeon, I think he is called, at Roslyn Clinic, and he took the casts off. Then they wheeled me into the X-ray room where they took more X-rays. After the

(Testimony of Baeda Windsor.)

X-rays they bandaged both legs tightly and we went home.

Of course, Dr. Williams told me to be very careful. I would [13] have to start out very easily, just to learn to move at first, and there was a great deal of swelling. My feet were very, very thin after the casts came off, but they started swelling after I started putting my feet down.

Q. During that six weeks' period and up until the time that you are testifying about now, was there any pain and suffering in respect to this?

A. Oh, yes. The healing process was agonizing at times. That was not continuous, but I would wake up at night and I could not sleep.

Q. After you got home with the cast off, did you then proceed to walk around normally?

A. Oh, no. I had to learn to stand first. I would hold onto something. I would brace myself with both hands just to start and learn to stand first. I had to do that first and only for just a few seconds at a time and then I would rest and as days went on I would take a few steps. I used the wheelchair for a couple of weeks, anyway.

Q. That is after the six weeks' period?

A. Yes.

Q. So after the wheelchair, did you use something else? A. I beg your pardon?

Q. Did you use anything other than the wheelchair?

(Testimony of Baeda Windsor.)

A. After I started to take a few steps I used the wheelchair to push in front of me and then after we sent the wheelchair [14] away I used my chair, a small chair with a back to it, so I could hold onto it and feel more secure. Of course, it was very painful and they swelled up all the time. It was like learning to walk, but I knew I had to try to do it if I was going to walk again.

Q. How long a period of time did this go on?

A. Well, that went on for several months excepting that there was improvement as it went on.

Q. After the six weeks' period for several months you proceeded that way; is that right?

A. Yes.

Q. Was that under the direction of your doctor?

A. Yes. He said to be careful, and also I had massages and the X-rays and I exercised the ankles even though it hurt to move them, but I kept twisting it up in a rotary fashion, like that.

Q. Is there any noticeable effect by reason of the accident in respect to your ankles?

A. Yes, there is, because I cannot stay on them for any length of time and they tire very, very fast.

Q. How long would you say?

A. Well, I know I can't stand in one spot for as long as half an hour and I don't think I can do that. Then I have to sit down when I even wash dishes.

Q. Well, what occurs that makes you sit down?

A. They start to ache and they swell up so I go and sit down because I just can't stand any more.

(Testimony of Baeda Windsor.)

Q. After a period does the swelling go down?

A. It goes down. I usually elevate my feet. I sit down some place where I can put my feet up upon a stool or something.

Q. Prior to this accident—I notice you have flat shoes on—were those the only type shoe you wore?

A. No. I usually wore high heels and all stages in between, but I can't wear high heels any more; I can't bend my foot and I notice in particularly in a ramp now in walking, I can walk along and when I come to a ramp that is, well, even a slight bit elevation going down, I have to really have something to hang onto because they don't seem to want to bend enough forward to walk down.

Q. In other words, your foot doesn't bend as much as it did previously?

A. No. It is not as flexible. It won't bend.

Q. You notice any lack of flexibility or any difference in your walking now as compared to before the accident?

A. Yes. I used to step in a sprightly fashion because I am accustomed to walking fast and now I have to walk slowly.

Q. Did you ever dance prior to your accident?

A. Yes. In my younger days I did some fancy dancing. I could bend my feet way over, but I can't do anything like that, I haven't the flexibility now. I always went to parties and they [16] started to have a little square dancing—I did that recently and I thought maybe I might try to join in that, but I could not because I can't slide sideways at all.

(Testimony of Baeda Windsor.)

Q. You hired one nurse, your husband a nurse, is that correct? That was during the six weeks' period? A. Yes.

Q. Then you dispensed with the nurse?

A. Yes. I also had some help, I had household help, in by the day. I couldn't do any of the usual things that I did.

Q. How long a period did you have that household help?

A. Well, I had one come in every day for about two months and then after that occasionally.

Q. How frequently?

A. Well, about twice a week.

Q. Over how long a period after the two months?

A. That was several more months; about three or four months.

Q. About three or four months you had somebody come in twice a week? A. Yes.

Mr. Lillie: You may cross-examine.

Cross-Examination

By Mr. Deasy:

Q. The accident happened on June 21st of 1947?

A. That's right.

Q. You said, I think, about 8:00 o'clock in the evening? A. Yes. [17]

Q. The place where the accident happened was in the Yosemite Park? A. That's right.

Q. You were walking by yourself, were you, at the time? A. By myself.

Q. Your husband was coming out behind you?

(Testimony of Baeda Windsor.)

A. Behind me.

Q. By the way, was the boy with you at that time?

A. No; the boy went out ahead to see the dog in the car.

Q. The car was parked up against this platform?

A. Yes; facing it.

Q. Were there other cars similarly parked at that time?

A. I know that there was another one because I tried to lean against it while waiting for the ambulance; I leaned partly against the big step.

Q. There was another car there and not your own that you leaned on?

A. There was another car, not our own, but ours was on the other side; it was between the two cars.

Q. You were walking along— isn't it a fact that you turned, or you stepped before you fell—you did not walk right up to the edge of that platform, did you?

A. I hesitated only enough to make a step.

Q. You realized that there was a step there, did you?

A. Oh, yes; I knew there was a step there but it was not clear, [18] it was dark; there were no lights out there.

Q. Isn't it a fact that you were standing with your back turned toward the step and that you took a step backward and fell?

A. Oh, no, no. I would have broken my back if

(Testimony of Baeda Windsor.)

I had gone over backward. I never walked backward.

Q. When you came down the steps from the porch of the cafeteria—there is a porch there?

A. Upper part.

Q. And you came down some steps to get onto the platform where the accident happened?

A. Yes.

Q. That is a sort of sidewalk there, isn't it?

A. I think so, but I don't have a real recollection of that upper part.

Q. The lower part, I mean; you come down off the porch of the cafeteria onto the sidewalk?

A. Yes; that is wooden.

Q. You did not cross right out directly from the step, you came down the step, you didn't walk right over to the edge?

A. I angled over toward the car.

Q. In the direction where your car was?

A. Yes.

Q. You were wearing these shoes which have been introduced in evidence; is that right? [19]

A. Yes. I always wear shoes like that where we do any amount of walking; I wear shoes like that then.

Q. Sort of moccasin? A. Yes.

Q. What part of your shoe hit on this roughness that you spoke of on the platform?

A. The top part, you mean?

Q. You said your foot caught and that caused you to lose your balance.

(Testimony of Baeda Windsor.)

A. Yes; something caused me to lose my balance. I couldn't say what. Subsequently we saw the condition of the step but I couldn't see that at the time.

Q. The edge of the platform is sort of chewed up?
A. Yes, from cars.

Q. From bumpers?
A. Bumpers.

Q. After you fell you looked, did you, to see, or your husband looked to see what had caused you to fall?

A. Yes, he examined that thoroughly. Of course, I didn't—I was in terrific pain down there. I was only interested in getting to the hospital.

Q. So actually you didn't know what it was, of your own knowledge?

A. I didn't actually then because I couldn't see.

Q. You don't know actually of your own knowledge, do you, whether [20] a nail was protruding out through the wood that your foot could have hit on?
A. I couldn't answer that.

Q. It may have been a knothole in the wood, or just what the condition was you don't know?

A. No; I couldn't answer what actually caused me to fall but it was like stepping off into space. I did my best to catch myself and that is what happened.

Q. I understood you to say that you were accustomed to wearing high heels before the accident and you have been unable to wear them since then.

A. That's right.

Q. Did you customarily wear high heeled shoes?

(Testimony of Baeda Windsor.)

A. Not all the time. There is a medium heel for walking like where you give it real rough wear in the national park, then I would wear shoes of that type.

Q. Had you ever been to Yosemite Park before?

A. No; I had never seen the park before.

Q. You had been accustomed to visit other national parks, had you?

A. Other national parks, yes.

Mr. Deasy: I think I had no further questions.

The Court: It is 12:00 o'clock now. We will take an adjournment until 2:00 o'clock.

(Thereupon an adjournment was taken to 2:00 o'clock p.m.) [21]

Afternoon Session, Tuesday, July 12, 1949, 2 P.M.

Mr. Lillie: I would like to call Mr. Windsor.

HERBERT D. WINDSOR

called as a witness in his own behalf, sworn

The Clerk: Will you state your name, sir?

A. Herbert D. Windsor.

Direct Examination

By Mr. Lillie:

Q. Mr. Windsor, where do you reside?

A. 118 Laurel Drive, Altadena, California.

Q. You are the husband of the plaintiff, Mrs. Windsor? A. That's right.

(Testimony of Herbert D. Windsor.)

Q. And what is your occupation?

A. Civil Engineer with the United States Government, Corps of Engineers, the Army.

Q. How long have you been employed in that capacity? A. Approximately 14 years.

Q. And prior to that, what was your occupation?

A. I was an architectural engineer in Chicago.

Q. For how many years did you hold that position? A. Ten years.

Q. Now, what schooling have you had?

A. Graduate architectural engineer, Chicago Technical College.

Q. And were you present at the time of the injury to your wife on June 21, 1947?

A. Yes. [22]

Q. And will you relate substantially what occurred at that time?

A. Well, as—starting from the time we came out of the cafeteria?

Q. That will be sufficient.

A. Coming out of the cafeteria I delayed back a little to—I got a few scraps from the cook.

Q. Pardon me just a minute. We can assist the Court and counsel here—I would like to show you Plaintiff's Exhibit 1 and ask you whether or not you have seen this before? A. I didn't get it.

Q. Have you seen this before?

A. Yes, just a few minutes ago.

Q. You looked at it, did you not? A. Yes.

Q. And as an engineer you understand the reading of this plan? A. Yes.

(Testimony of Herbert D. Windsor.)

Q. Now, can you show the Court approximately, on the day in question, where you parked?

A. I can only be approximate. It was down in this end of the platform, away from the cafeteria; the cafeteria was up here, (indicating) and we were maybe about a third or fourth car from the end of it. As the car strips were about 6 or 7 feet, we would be in the neighborhood of 25 feet from the end, in this—right in about there. (Indicating)

The Court: Let the record show he refers to Exhibit 1 on the left side at the upper corner about where the gutter is.

Mr. Lillie: That is correct, Your Honor.

Q. Now, then, will you show us where the cafeteria is?

A. Down at this end, this end of the platform, the little doorways go in there and in that way you come out in the double doors.

The Court: Pointing to the left end of the top of the drawing of Exhibit 1 which has the word "cafeteria" on it.

Q. Now will you note that portion of the drawing, or drawings marked Section CC, can you identify that as a side view of the wooden platform, the concrete step, the gutter part and the porch steps and the lodge porch?

A. Yes, that part of the steps in the lodge platform, but not at the spot where "CC" is back closer to the cafeteria where we came down would be more like over toward this end, more like "DD."

(Testimony of Herbert D. Windsor.)

The Court: Did you walk all the way along that wooden platform, the lodge porch, after you left the cafeteria, walk along the lodge porch until your wife fell, went down on the wooden platform?

The Witness: Yes, sir, we crossed this porch and I can't say definitely, I don't remember which set of steps we came down, there are three steps coming down from that porch.

The Court: From the lodge porch to the wooden platform.

The Witness: Then we angled across—to the best of my [24] recollection I would say we came there and angled across.

The Court: You came down from the lodge porch to the wooden platform of the set of steps that your wife did?

The Witness: Yes, sir, I did; I was directly behind her.

The Court: Then you came down those steps and angled, your car was angled against the wooden platform?

The Witness: Yes, sir.

The Court: Against that cement?

The Witness: Right against the block.

Q. (By Mr. Lillie): Mr. Windsor, on this map can you ascertain whether or not there is a cross-section other than "CC" in respect to the wooden platform on the side view?

A. Yes, this "DD" section is closer to the scene of the accident. The section "DD" is down towards

(Testimony of Herbert D. Windsor.)

this end and is much closer where the scene of the accident occurred.

Mr. Lillie: For the sake of the record we are pointing to a side view specifically set out as Section "DD" in the lower left hand corner of Plaintiff's Exhibit 1.

Mr. Deasy: May it appear that all the witness' testimony has been directed to drawings appearing on the first page.

Mr. Lillie: That first page of the plaintiff's Exhibit 1.

Q. Now, keeping that section in mind, can you determine from the drawing what the depth is from the top of the wooden platform to the top of the first cement step?

A. Yes, the dimensions were, the dimension line from the top [25] of the concrete up to the top of the platform, and it varies from 7 inches to 8 inches on that distance, and then if you want to drop down from the concrete, from the concrete down on to the pavement, down to the bottom of the gutter, there is a dimension line there, an arrow pointing to it which varies from $7\frac{1}{2}$ inches to 12 inches. From the concrete, top of the block, to the bottom of the gutter and then at the bottom, the depth of the gutter varies from one inch to two inches, width from 6 to 10 inches.

Q. Now, at the time, or immediately after the accident, did you go back and look at the platform, the gutter and the cement step where your wife had fallen?

(Testimony of Herbert D. Windsor.)

A. Yes, sir, the very next morning my son and I went back. We approximated the exact location where our car was parked and I marked off the heights there at that time and we inspected the steps and the platform very carefully and I marked them off, because at a glance I could see the irregularities and the variance of the height and due to my experience in designing stairways, without measuring I could see that the stairways, the steps were not properly designed and so I wanted to get the correct measurements of the steps so I could reproduce it all on drawings.

Mr. Lillie: You may sit down.

Mr. Deasy: I move to strike the portion of the witnesses's answer "he knew it wasn't properly designed, he could see it [26] wasn't"——

The Court: Not responsive in the first place. It may go.

Q. (By Mr. Lillie): Mr. Windsor, how much did you find the variance in the distance from the top of the cement step to the gutter, bottom of the gutter in that area?

A. I checked it about three places and there was variation, say in the height there from about $9\frac{1}{2}$ to over 10; it would vary from $9\frac{1}{2}$ or 10 probably $10\frac{1}{2}$ inches variance in the three places I checked.

Q. That—page 1 of section "DD" showing a variance——

The Court: $7\frac{1}{2}$?

Q. $7\frac{1}{2}$ to 12——

(Testimony of Herbert D. Windsor.)

A. It could be, at different locations it varied.

Q. Well, in your experience as a civil engineer and an achitectural engineer, have you had occasion to design steps, different types, stairways?

A. Yes, sir, I have designed many steps and stairways on the drawing board, in all plans for buildings.

Q. For how many years?

A. Well, I was employed in Chicago for 10 years and worked on all types of buildings and in that capacity I designed and detailed stairways and steps, not specializing on stairways, but that was part of my duties.

Q. You are familiar with the usual standards used for an architectural design for steps? [27]

A. Yes, sir.

Q. Can you tell the Court what they are?

A. Well, we have variable rules for designing stairways, but I would say our first rule is that all the risers must be an equal height, and we have one rule that twice the rise plus the run must be in the neighborhood of 25 inches. I will give you an example of that—that is an old fashioned rule—if you start $7\frac{1}{2}$ inches you take and double that, 15, and add 10, you get 25 inches. That is a kind of rule of thumb you use to design, to see that your stairs are comfortable.

Then you have another rule that the riser times the tread will equal in the neighborhood of 75 inches. That will work for a 10, and a $7\frac{1}{2}$ inch

(Testimony of Herbert D. Windsor.)

rise, would give you that; $7\frac{1}{2}$ inch rise times the 10 inch tread would give you 75 inches. That is another rule. And then we checked them in varying rules; and these considered, we would never design a step with a greater rise than $7\frac{1}{2}$ inches for any stairway.

Q. Well, did you have occasion, or is it customary to design steps where the risers will be of different dimensions?

A. No, that is the fundamental rule in all stairway construction, that the risers must be equal height and all uniform risers in any one run of a stairs, in all the buildings I have ever encountered. They will allow you, due to the inaccuracies of construction—some call for 7 to $\frac{3}{16}$ ths of an inch tolerance, there is no such thing as getting them identical, and you strive [28] for that, of course, in your construction. But there is inaccuracies of construction because they have, they know through tests of years of experience, people in taking the first step, something seems to cloud in their mind, they expect the next drop to be the same as that one they have taken the first time going down. They kind of, or intend to shift their weight to balance so that they will meet the next step at that time.

Q. Well, as an engineer having seen these steps, do you have an opinion in respect to the structural design of them? Now, I just asked you whether you have an opinion.

A. Yes, I have an opinion that they are not.

(Testimony of Herbert D. Windsor.)

Q. Wait—— A. Pardon me?

Q. Will you give us that opinion?

A. Well, based on my experience in architects' and engineers' offices and in designing stairways, I can tell you that those steps are improperly designed and I would say in my opinion that no architect detailed them. That is, in my opinion, I would say they were not detailed by an architect. When they were constructed but maybe—you know just how certain things get built with the carpenter with no architect designing them. No architect I have ever heard of would put his name below a drawing and say that is the design of a step because he has certain responsibilities.

Q. Well, is your opinion based on the fact that the ditch ran parallel with that last step? [29]

A. That is one of the bases for my opinion. There are several others.

Q. What are the others?

A. Well, the other is the varying height of the riser. The risers must be of equal height. We have to start with that on any stairway, and the condition of the edge of the platform, you must have a solid footing when you shift your weight to go down a step, you put all your weight on one foot, and if you haven't got a level surface, when the surface receives that weight you must have a level surface to receive it at the bottom so that the—the gutter causes that irregular surface and your weight is coming down on one end so that alone—. And then,

(Testimony of Herbert D. Windsor.)

of course, is the inadequacy of lighting because if there is a hazard there and you can't see it to exercise the greater caution, you can't see it distinctly, you are at a disadvantage in that respect.

Q. Well, let us go on to the time of the accident, when you left the cafeteria with your wife. How far ahead did she precede you?

A. Well, I should say—you can't be exact on that—but maybe about, well, I would say that about 3 or 4 of my steps which would be in the neighborhood of ten feet, 10 or 11 feet ahead of me.

Q. And did you keep your eyes upon her as she walked along the platform?

A. Yes, I kept my eyes pretty well upon her. [30]

Q. And in other words, you were facing her?

A. Yes.

Q. Her front or where?

A. She had her back to me, she was proceeding ahead of me at the same rate.

Q. You were facing the direction she was going?

A. We were walking in single file, only I was 3 or 4 steps to the rear.

Q. And was it light or dark out or was it——

A. No, it was dark. This was down in the canyon at Yosemite and at 8 o'clock at night there it is pretty dark, so in the steps—there was no artificial light that was reflected on the steps.

Q. None whatsoever?

A. There was some light inside of the curio

(Testimony of Herbert D. Windsor.)

store, the cafeteria, you get some reflected light through the window, but it was in shadow pretty much of it, it varied, the lights were very dim.

Q. Did it reflect out to the wooden platform at all?

A. Well, as to the extent of the reflection it no doubt would partially, but not very greatly out that far; and the cafeteria was closing up at the time and they had turned out quite a number of their lights and there wasn't a great deal of illumination, inside even it was dimly, very dimly lit.

Q. Was it sufficient that you could see the steps?

A. You could see the steps in outline only. [31]

Q. That is all? A. Yes, no details.

Q. Will you tell us just what occurred?

A. Well, I was conscious of my wife slipping there at the top of the step. Just as she started down I was conscious that she reached her arm out as though losing her balance to try to stop herself. Well, I saw her come down real quick and then take another step down real quick. I heard her groan and then I saw her put the other foot down and slump to the pavement. It all happened pretty quick because I just froze to the spot. I didn't have time, I couldn't get to her—you know how that is when something like that happens, I couldn't reach her. She just slumped to the steps, so I reached over to her and I tried—I asked her if she could stand at all. I was going to pick her up. She was right down

(Testimony of Herbert D. Windsor.)

at the bottom of the step in the gutter, so I was going to pick her up. I didn't stop to think it would be the wrong thing to do and so she said, no, that I had better not move her, and I could see she was in pretty bad pain. And some people come up and I asked the girl there about a hospital. She said she would call an ambulance up—there was a girl there—call an ambulance and I tried to comfort my wife as much as possible and asked the girl to bring a drink of water and she did that, and we waited there until—I didn't move my wife, just tried to make her comfortable as possible until the doctor came with the ambulance, and he put her—and [32] his helper—put her in the ambulance and drove back to the Lewis Memorial Hospital and I followed in our car and then I went right in there and he put—took my wife in the operating room and examined her ankle. He told me he was sure there were broken bones, but we would have an X-ray. So he took the X-rays before he made any definite decision and developed the X-rays right there and proceeded to show me the broken bones, the break, the left one came at a very diagonal—the break right diagonally down the bone. And it looked kind of bad to me, and the right bone was just broken transversely right straight across. He proceeded to put the bones in a cast there and I talked to him about the breaks and we discussed them and he had never had—I asked him about the two broken ankles. He had never had two broken ankles, a great

(Testimony of Herbert D. Windsor.)

many come in singles, just like that from the ski jumpers would come up and ski and he said he has had about an average of two a day, he was very competent, we got excellent medical attention. I asked him about that more like you want to know a man's experience in setting a bone, and he had experience in the Army.

Mr. Deasy: I object to this as not responsive to the question.

The Court: I don't think you need to go into that.

Q. (By Mr. Lillie): Did you observe at the time your wife stepped off the platform, which direction she was facing?

A. Oh, yes, she had her back to me and was facing the way she [33] was going toward the car and down the steps.

Mr. Lillie: May I have this marked as plaintiff's exhibit next in order for identification only?

The Clerk: Marked Plaintiff's Exhibit 14 for identification.

Q. (By Mr. Lillie): Will you look that over, Mr. Windsor? Did you make any payments in respect to medical care for your wife?

A. Oh, yes. The first payment we had to pay the doctor in the hospital at Yosemite before we left.

Q. And then did you make payments for the rental of a wheel chair? A. Yes, sir.

Q. And also payments for help that was needed around the house?

(Testimony of Herbert D. Windsor.)

A. Yes, sir; and the practical nurse, we got a practical nurse in right away.

Q. And also for the domestic help thereafter?

A. That's right.

Q. And that is expressed on this exhibit, is that correct; you kept a detailed account of it?

A. Yes, I did up to that—that is only complete up to that date.

Q. Did you have any other added expenses other than this?

A. Yes, we have had added expenses. My wife gets massage treatments for her ankles. [34]

Q. That is subsequent to the filing of the complaint? A. Yes, she continues with those.

Q. But up to the time of the filing of your complaint, this is approximately the amount that was spent, is that correct?

A. Yes, that is right at that time.

Mr. Lillie: We will offer this as the plaintiff's exhibit next in order, your Honor.

Mr. Deasy: There is no objection by the Government.

(Whereupon the document above referred to and marked plaintiff's Exhibit 14 for identification was received in evidence.)

Mr. Deasy: I think the record should show this is a memorandum, I assume, prepared by Mr. Windsor.

Mr. Lillie: That is right.

Mr. Deasy: Summarizing expenses that he had incurred, medical.

(Testimony of Herbert D. Windsor.)

The Witness: That is correct.

Mr. Deasy: And you prepared this prior to the filing of the complaint in this action?

Mr. Lillie: I think this was prepared subsequent.

The Witness: Unless—about the same time it runs up——

Mr. Lillie: \$601.21—the date, I mean—the date is June 15.

The Court: June 15 of what year?

Mr. Lillie: 1948.

Mr. Deasy: This is an accurate memorandum of the actual expenditures you and your wife incurred? [35]

The Witness: Yes, up to that time.

The Court: You consider it is reasonable?

The Witness: Yes, sir; more than reasonable. We economized in every manner and means.

Q. (By Mr. Lillie): As a matter of fact, there was medical attention that you received for which there was no payment made based on your carrying insurance; is that correct? A. Yes, sir.

Q. And you didn't even ask for the reasonable value of those services, did you?

A. No, sir. We carry group insurance—the only stipulation you have, I had to sign an agreement with them that in the event the expenses are recovered, they charge you the full amount on the claim. I don't know whether you are familiar with them——

Q. That is a matter of \$30? A. Yes.

(Testimony of Herbert D. Windsor.)

Q. And you have included that in the list?

A. Yes, because the other just includes just the regular ones.

Mr. Lillie: The amount shown here, your Honor, is the sum total of \$601.21, and I should like to move the Court to permit the plaintiff to amend the complaint by interlineation by substituting that amount for the sum of \$463.50 heretofore shown.

The Court: That will be granted.

Mr. Lillie: Thank you. That is all. You may cross-examine.

Cross-Examination

By Mr. Deasy:

Q. Mr. Windsor, calling your attention to [36] these photographs, have you seen these photographs which are marked in evidence?

A. No, sir, that is the first time.

Q. Step down and look at them. Just want to ask you if those photographs represent with a reasonable accuracy the conditions existing at the platform in front of the lodge in Yosemite Park at the time of the accident to your wife?

A. Yes, sir, as near as I can tell from photographs.

Q. That is without having reference to the exact point on the platform where the accident happened?

A. I can't state it is in the spot otherwise——

Q. Now, picking one out here, number 4, Exhibit No. 4, shows a portion of the platform and a portion of the parking lot in front, paved parking place in front of the platform, and in the rear of

(Testimony of Herbert D. Windsor.)

the photograph appears a porch with a railing; you observe that, do you? A. Yes, sir.

Q. Now, in your previous testimony with reference to stairs, you were referring were you to what appears to be a wooden platform and then below that a concrete porch and below that the roadway; is that right?

A. That is right; those steps that you take to get down from the platform to the paved area where the car——

Q. With reference to the length of the platform or the width of it, of what you call the steps, could you estimate approximately [37] how long that platform is?

A. It was very long, probably one hundred feet.

Q. It runs along the entire front of the building, doesn't it?

A. Yes, pretty much so, as near as I can recall. It is a very long platform.

The Court: Past the cafeteria, then?

The Witness: No, I think not. I think it ends just at the end of the porch and the cafeteria is beyond that, but it is—although the cafeteria might come beyond that, around it. There is a curio shop in back.

Q. In giving your opinion previously with reference to whether or not that is a properly designed area, your opinion was given with the assumption that constitutes a stairway?

A. I think the steps you take from the platform

(Testimony of Herbert D. Windsor.)

down, you must go down those steps to get in the car.

Q. To get to the street?

A. The pavement, to the car.

Q. Isn't it, as a matter of fact, the top porch which is composed of wooden planks, two by twelve inches in size, constitutes a sidewalk in front of the building? You come down a flight of steps, three flights of steps from the porch of the cafeteria building down on to this wooden walk; isn't that right?

A. That's right, that is a walk-way, a platform; I referred to it as a platform.

Q. It is, in fact, isn't it, Mr. Windsor, a sidewalk in [38] front of the building?

A. I would have to think about a definition of a sidewalk. I think the porch up above was used as a sidewalk, although a sidewalk ordinarily is not elevated and this was elevated two steps, so I would rather call it a platform rather than a sidewalk.

Q. It is similar in construction, is it not, to sidewalks in other areas where there are considerable winter snows?

A. I have never had an occasion to see a condition like that, but I imagine there could be the same type of sidewalk for that if you want to refer to it as that, but as to its—a platform, it is up maybe 18 inches above the paved area.

Q. That is above the general area where automobiles are parked?

(Testimony of Herbert D. Windsor.)

A. Yes, sir, so you must take two steps to get up there.

Q. At the time of your wife's accident, there were certain portions of that area which were marked off for the parking of the automobiles; isn't that right?

A. Yes, sir.

Q. And in fact you parked your own car there, others were parked there?

A. Yes, sir.

Q. You parked the car at right angles to the length of this concrete bulkhead running along there?

A. That's right.

Q. There were portions of that paved area where, were there [39] not, where parking was not allowed?

A. Yes, sir, about in the center of the paved area, about the center of the platform, there were two lines across the pavement which was marked where parking was not permitted at that point.

Q. That was such as the stairway going up from this platform to the upper portion?

A. It went up the same continuous steps where right along that would lead up to the platform. There were two white lines that marked that off as a walk-way.

Q. Persons could go directly up without having to go around his automobile that was parked, from the pavement up to the wooden platform, then up several steps to the enclosed porch?

A. If you got out of your car you would have to walk back behind the row of cars and then

(Testimony of Herbert D. Windsor.)

across to get into that strip. There was no room to go in front of the cars because the car bumpers, the grill and bumper blocked that off.

Q. The automobiles were parked right——

A. (Interruptnig): Against the——

Q. Bulkhead?

A. Yes, the concrete forming a bumper for the cars, help to stop.

Q. Now, do you recall whether or not the place where your wife fell was at the portion of the platform that is marked off for entrance and exit into the paved area? [40]

A. Oh, no, it wasn't. It was down where we parked our car which was down toward the lower end away from the cafeteria. Cars were parked there, they were lined up for the cars, and that is where it was, right in the vicinity, where our car was parked. It was adjacent to our parked car.

Q. You are quite certain that your wife continued to walk right along until she arrived at the edge of the platform and then she fell; is that right?

A. Yes, sir.

Q. While walking forward? A. Yes, sir.

Q. You don't recall having her stopping there and turning about to speak to you?

A. No, she didn't do anything of that kind.

Mr. Deasy: I have no further questions.

The Court: I would like to ask the witness a question.

(Testimony of Herbert D. Windsor.)

Examination

By the Court:

Q. When you arrived there and drove your car up against the front bumper, against that cement bulkhead, the tires hit the concrete? A. Yes.

Q. And then, after you had done that—what kind of a car were you driving?

A. 1947 Nash.

Q. You were driving it? [41] A. Yes, sir.

Q. Where was your wife sitting?

A. On the side of me.

Q. And in the center a dog, I guess.

A. Yes.

Q. You got out of the car, at the time you parked the car was there a car on either side of you?

A. Fairly certain there was a car on the side where we got out.

Q. That would be on the left side of you?

A. I think we both got out on the right because we went toward the cafeteria.

Q. Then when you got out on the right, got out of that car, what did you do, step right up, you and your wife and boy, step right up onto this cement step and then from there on to the wooden platform and then go over to the stairs and go on to the porch and then go from the porch into the cafeteria?

A. That is the way we went, stepped right up on the platform from the car.

(Testimony of Herbert D. Windsor.)

Q. All three of you did that? A. Yes, sir.

The Court: That is all I want.

Q. (By Mr. Deasy): You were going back the same route in reverse when the accident happened?

A. We went right toward our car.

The Court: When did you arrive there at the park, about [42] an hour before you left?

The Witness: Arrive in Yosemite?

The Court: I mean, arrive at the lodge there.

Mr. Lillie: The place where you parked.

The Witness: Yes, as soon as we parked we went into the cafeteria.

The Court: What time of the evening was it?

The Witness: Oh, it must have been close to the time the cafeteria closed. It was getting around 7 o'clock, in the neighborhood of 7 o'clock because——

The Court: Was it light then?

The Witness: It was rather a twilight. It wasn't light enough to see distinctly, it was kind of——

The Court: It was the longest day of the year.

The Witness: In the canyon, the walls of the canyon—I know that we remarked how dark it got, got dark early there.

The Court: That is all.

Mr. Deasy: I have no further questions.

Mr. Lillie: You may step down.

Plaintiff rests, your Honor.

Mr. Deasy: At this time, your Honor, in behalf of the defendant, the United States Government, I move the Court for a judgment in favor of the

defendant upon the ground, first, that the complaint in the action does not state a cause of action against the defendant, the United States of America, under the provisions of the Federal Tort Claims Act in that it is alleged nowhere in the complaint that any employee of the United States was guilty of any act or omission, wrongful or negative, in the line of duty, or the scope of his employment. The complaint merely alleges that the defendant, referring to the defendant who is—which has been since dismissed from the case, and the defendant, the United States of America, that the defendants were careless and negligent in the following particulars: I am referring to paragraph 5 on page 3—

“In failing to maintain said platform, or sidewalk flooring in a safe condition. The partially decayed, jagged and worn condition of the said platform planks, above the aforementioned concrete step, rendered said means of egress and ingress to the said cafeteria, and other facilities operated by the defendants extremely hazardous and dangerous to the defendants customers, invitees and to the public;

“In failing to maintain adequate lighting for the safety of their customers, invitees and the public, at said time and place rendering said means of ingress and egress extremely dangerous and hazardous to defendant’s customers, invitees, and to the public using the same;

“(c) that defendants at said time and place carelessly and negligently failed to warn or advise their customers, invitees and the public, among whom was

plaintiff, Baeda [44] E. Windsor, of the existence of the unsafe conditions of the said edge of the platform flooring, although defendants knew, or should have known that the said plaintiff was unaware of the existence of same; that defendants at said time and place carelessly and negligently maintained the pavement immediately adjacent to said concrete step. The pavement was of uneven surface and of a different grade from the main pavement, rendering same extremely dangerous and hazardous to customers, invitees and to the public using the same."

Now, the Federal Tort Claims Act allows the suits against the United States in situations only where it is alleged and proven that some employee of the United States while acting in the line of duty, or the course and scope of his employment, was guilty of some negligence or wrongful act or omission. Now, there is a mere allegation here that the United States failed to give warning of the dangerous conditions existing on these premises. There is no allegation that any employee of the United States had knowledge of the existence of a dangerous condition.

Under those circumstances, there is a failure to allege the cause of action under the Federal Tort Claims Act.

Secondly, we move for a judgment in favor of the Government of the United States upon the ground that the evidence in the case fails to establish any act or omission on the part of [46] a Government agent, either in the line of duty or otherwise, so

far as that is concerned, which constitutes carelessness or negligence. There is no proof that the United States maintained or was under any duty of maintaining, repairing or operating the lodge premises upon which this accident occurred.

Now, I would like to invite the Court's attention to Plaintiff's Exhibit No. 1, this blueprint. On page 1 of the [46-A] said blueprint, the portion marked Section "CC" which is a profile of, or section of the platform and concrete step and the parking area, there appears a notation, there is a line drawn directly along the exterior surface of the concrete step, referring to this mark-up, Exhibit 11, this line, this surface here (indicating), the blueprint indicates the National Park Service maintains a portion of the premises from the exterior surface of this bottom step across the roadway and that the Yosemite Park and Curry Company maintains the property on this side, on the upper side, down to this surface. In other words, that the maintenance, as far as the United States is concerned, is confined at that point to the roadway, the parking area and the gutter abuts upon the concrete bulkhead and the concrete bulkhead, the wooden platform above it and the building abutting on the platform on the other side are maintained by the Yosemite Park and Curry Company under the terms of the lease, which is in evidence here as Plaintiff's Exhibit No. 8.

Now, with reference to the evidence before the Court, it appears that from the examination of the

photographs and the other documentary evidence introduced here, that in front of the building which was operated by Yosemite Park and Curry Company, or under lease or agreement with the Department of the Interior of the United States, there was a wooden platform extending the width of the building as the plaintiff Herbert Windsor estimated some 100 feet or less. That adjacent to this [45] wooden platform was a concrete bulkhead approximately $7\frac{1}{2}$ inches lower than the—that is, the top surface of the wooden platform immediately adjacent to this concrete bulkhead; that then there was a drop somewhat irregular running more or less 7 to 12—7 to $9\frac{1}{2}$ inches, I think it was, between the concrete bulkhead and the surface of the paved parking area. It is apparent from the evidence that the area in question was used for the parking of automobiles operated by persons having business within the lodge premises. As Mr. Windsor testified, there were portions of the platform and the area immediately adjacent to it marked off with white lines as no parking area, that these were opposite the stairs leading up from the wooden platform to the porch of the lodge and were obviously kept clear as a means of ingress and egress provided by the operators of the lodge premises for the entrance and exit of guests and other invitees into their premises.

It appears from the evidence that the plaintiffs, Herbert and Baeda Windsor, upon arrival parked their automobile in the parking area abutting it, the front wheels of the same against the concrete bulk-

head paralleling the wooden platform; that then they proceeded to take a short-cut to the porch by climbing up over the concrete bulkhead onto the wooden platform and then proceeding along the same to the steps leading to the porch; that they did not at that time avail themselves of the [47] means of ingress and egress provided by the operators of the premises; that upon completing their business in the lodge premises, they then proceeded to leave the same to return to their automobile, making use of the same short-cut to get back to the car, although as the testimony shows at that time it had become somewhat darker and the light was dim and the condition of the steps and the platform difficult to judge by reason of the lack of artificial lighting adequate to show the conditions at that place. But nevertheless they elected to proceed by the shortest route rather than take the route provided for them by the operators of the premises.

At no time while they were in the lodge premises were they there at the invitation of the United States. They were there upon business in the lodge as invitees of the Yosemite Park and Curry Company, the operators of the premises under this lease agreement from the United States.

That at no time did the United States undertake to operate the lodge premises to provide means of ingress or egress thereto or to undertake the upkeep of the platform abutting on the parking lot.

That the evidence shows that the concrete bulkhead and the platform were operated by the Yosemite Park and Curry Company under agreement

of the United States. There is nothing in the evidence, your Honor, to show that any employee of the United States had any duty to erect any hand rails, guards, lights or [48] other equipment upon the portion of the premises where this accident happened. The only conceivable basis that the plaintiffs could assert—upon which the plaintiffs could assert any cause of action against the United States would be upon the theory that the provision of a gutter next to the concrete bulkhead constituted an act of negligence.

Now, it should be, I think, remembered that this accident took place in a National Park, a mountain area provided by the people of the United States for recreation and for scenic purposes. Other park purposes is that it is in a mountainous country, that the Government has attempted, and the lease which is in evidence will show, that it is the policy of the Government to attempt to maintain as much of the natural scenery as possible, having in mind that some comforts should be provided for those who care to avail themselves of the park.

This is not a situation comparable to an accident of a similar nature occurring in a metropolitan center, in a city hotel or on a city street or sidewalk. When the public, including the plaintiffs in this case, visit a National Park, it is for the purpose of getting out into the country, into the wilds to some extent, so that they may enjoy the beauties of nature which is—it is the policy of the Government of the United States to make available to our

citizens; that when these plaintiffs, including Mrs. Windsor, visited the park they expected to visit a National Park. [49]

Mrs. Windsor testified that she had not been to Yosemite previously, but that she had visited other national parks, done a great deal of hiking and climbing and walking in the country. Therefore, it is not unreasonable that she should be expected to use care in her actions at this place where the accident happened; that she should not expect conditions to be comparable to city conditions, and that as a result she assumed a certain risk, conceding for sake of argument alone that a somewhat dangerous condition might have been existing. However, there is no evidence here to show that the government, that any employee of the government, had anything to do with the maintenance of these premises or that the act or omission on the part of any government employee had anything to do with the unfortunate injuries that the plaintiff sustained and the damages which they are after accrued to herself and to her husband.

Based upon these grounds, we move this Court a judgment in favor of the defendant, the United States, in this case.

The Court: Have you any evidence to offer yourself?

Mr. Deasy: If it should be necessary, I have one witness, Your Honor, yes.

The Court: I think I will deny your motion at

this time. You put your witness on. Is he available?

Mr. Deasy: Mr. McMullen.

J. I. McMULLEN

called as a witness on behalf of the defendant, sworn.

The Clerk: Will you state your name to the court, please?

A. J. I. McMullen.

Direct Examination

By Mr. Deasy:

Q. What is your occupation, Mr. McMullen?

A. I am a lawyer.

Q. And where do you reside?

A. Here in San Francisco.

Q. Here in San Francisco. Are you practicing law at the present time?

A. Well, about two days a week. I am more or less retired.

Q. And in the summer of 1947 were you a visitor at Yosemite National Park? A. I was.

Q. Calling your attention specifically to June 21, 1947, did you have occasion on that day to be at Yosemite Park?

A. Yes, I was at the lodge that night at the time of the movie.

Q. And approximately what time of day was that?

A. Well, I had dinner there and my wife and my granddaughter and her other grandmother had gone to the movies. I never go to the movies and I sat out on the rail and smoked my pipe.

(Testimony of J. I. McMullen.)

Q. Where were the movies that evening?

A. There in the lodge building.

Q. On the ground floor? A. Only one floor.

Q. On the ground floor?

A. Only one floor. [51]

Q. They are on the——

A. (Interrupting): They are adjacent to the office. Also adjacent on one side to the cafeteria and on the other side to the office of the lodge.

The Court: The living room of the lodge?

The Witness: Yes, sir

Q. There is a porch with a railing at the exterior edge along the front of the lodge, is that right?

A. That is right.

Q. About how wide is that porch?

A. Well, it is about 10 or 12 feet wide. I would guess 12, I haven't seen it for two years, but I guess about 12 feet.

Q. In June of 1947 were there chairs or benches upon that porch?

A. Yes, but they were all in use, people waiting for the movies. That is why I sat on the rail.

Q. Sitting on the railing, sitting on the exterior edge of the porch? A. That's right.

Q. Was there at that time below the porch a wooden platform? A. There was, yes.

Q. That ran along the entire——

A. The entire length about 100 feet.

Q. How wide is that, Mr. McMullen?

A. I would say that was about 8 feet, possibly 9.

Q. Now, on the evening of June 21, 1947, did

(Testimony of J. I. McMullen.)

you observe anything unusual while you were sitting on this railing, on the porch?

A. Yes, I saw a lady fall off the porch.

Q. Will you tell us what, in more detail, just what you saw?

A. Well, about five minutes after eight I just lighted my pipe, I saw a lady and two gentlemen, the lady standing right at the edge of the platform, at a slight angle from the edge, with two gentlemen about 3 or 4 feet away from her talking with her and then just like that she went down, went off evidently, went over the edge.

Q. Was she walking at the time?

A. No, they were not, they walked up there and just stopped and she turned to say to the man she was with, not entirely turned, just slightly.

Q. And you saw her fall at that time?

A. Yes.

Q. Where did she fall?

A. She fell right off onto the ground.

Q. Down into the parking area?

A. Yes, between two cars.

Q. Did you ascertain who the lady was?

A. I didn't until the next day. I asked Mr. Sharp the next day if the lady was injured and he told me she had both legs broken. [52]

Q. Would you recognize her again if you saw her?

A. No. When the FBI called on me to question me they asked me if I could identify her. I told

(Testimony of J. I. McMullen.)

them I think I knew she was a lady around 40, I could say that much.

Q. You didn't get a good look at her face on account of the darkness, is that right?

A. It wasn't too dark. I didn't try to.

Q. Do you recall about what time sunset was that night?

A. Well, sunset was around close to 8 o'clock that night, but 3,000, 3,300 feet mountain right back of the lodge, and night comes rather early out there, but it wasn't—the street lights were just across the street, a big bonfire 100 feet across the street right in front of the lodge.

Q. Was the bonfire lighted, do you remember?

A. Oh, yes.

Q. Were the street lights on at that time?

A. Yes.

Q. The street lights across the street?

A. Right across, probably 75 feet from the platform.

Q. Now, there is a place marked off on this platform, is there not, with painted white lines for persons to cross from the——

A. Not on the platform, on the walk. There is a walk enters right in the center of the building with steps up to the platform, and then from the platform up to the porch, and the ground is marked off "No parking permitted", for people to enter [54] and exit.

Q. It was on this porch platform that this lady fell?

(Testimony of J. I. McMullen.)

A. Oh, no, she fell between—there was one car parked next to this walk that goes up to the porch, steps, regular steps, and then she fell between that car and one that was parked next to it.

Mr. Deasy: I have no further questions.

Cross-Examination

By Mr. Lillie:

Q. Mr. McMullen, there was no markings upon the platform at all? A. No.

Q. That indicated an entrance down on the paved——

A. It was down on the ground, the markings.

Q. And as a matter of fact the steps that you referred to up to the pavement where there were the two diagonal lines leading up to the entrance are similar all along the front of that platform, aren't they. A. No.

Q. There is a distinction?

A. There is a distinction between those steps and the bulkhead. The bulkhead was a rather high step.

Q. Can you tell me what the distinction is?

A. Well, they were regular steps, I imagine, with about a 7 inch tread, and the height of the bulkhead must have been much more than that. I would say it was probably 10 or 12 inches. [55]

Q. And you said there is a distinction between the steps where you walk up to the platform and the rest of the bulkhead?

A. Oh, yes, no question. I have been going up there for 47 years.

(Testimony of J. I. McMullen.)

Q. Just before the lady fell off the platform, did you see both the gentlemen with her or was one of them behind her and how far, if he was?

A. They were both behind her. When she came up I noticed them, when they first came up, and immediately after they came up she turned around to say something to these gentlemen.

Q. There was not one gentlemen alone?

A. No, there were two gentlemen. I don't know, I don't say who they were, I don't know who they were. I didn't know who she was either.

Q. Do you recall what kind of clothes she wore?

A. No.

Q. Recall how tall a woman she was?

A. No, I didn't pay any attention to it. I just saw her fall and as a matter of fact, just a couple of years before I broke my leg exactly the same way in my own house.

Q. Mr. McMullen, let me ask you one other question: do you know whether or not on these steps which are marked off for an entrance up to the platform, is there a gutter running in front of them?

A. A gutter? [56]

Q. That is, a depression?

A. Well, I think there is a slight depression, no gutter, probably a slight depression.

Q. In front of the steps leading up to where you made the entrance?

A. No, Well—yes, in front of the steps there is a—

(Testimony of J. I. McMullen.)

Q. It was dark enough at that time so you couldn't identify the person, could you?

A. If I had known him I could identify the person. I could see she was a lady around 40.

Q. You could see the outline in respect to her and the two gentlemen?

A. Oh, no, you could see them pretty good.

Q. Do you see them in the courtroom now?

A. I—I wouldn't identify them now, no, from seeing them then.

Mr. Lillie: That is all.

Redirect Examination

By Mr. Deasy:

Q. How far away were you from them from where you were sitting, would you say?

A. Oh, about 10 feet at the outside.

Mr. Deasy: No further questions.

Recross Examination

By Mr. Lillie:

Q. Mr. McMullen, was there a curio shop in the back of——

A. There is a curio shop there they use for the office, the [57] curio shop and then the post office.

Q. Where were you sitting in relation to either the curio shop or the post office?

A. I wouldn't say that I was sitting, leaning against the second post from the stairway from the center of the building stairway.

Q. From the center of the building stairway?

(Testimony of J. I. McMullen.)

A. Yes. I can tell you better from the drawings. It was about 10 feet from the stairway, I think. I don't know, I am just guessing the distance.

Q. I will show you Plaintiff's Exhibit 1, the first sheet, and let me show you, here, this figure which shows a gutter, a wooden platform, and the lodge porch, the cafeteria over here (indicating), the grill, the lobby, the curio shop and the post office—I will ask you approximately—I presume it was on this lodge porch railing along here?

A. Here, the front steps around there. Leaning against this post.

Q. Leaning against this post?

A. That is right, right here, just about here. (Indicating)

Q. Therefore right up here? (Indicating)

A. Right in, somewhere right in there. If this was drawn as it should be, it should be right here, yes.

Q. Do you recall how many cars were parked?

A. They were full of cars. [58]

Q. They were full.

A. Almost never got a place to park a car there. That was reserved for people that were going to register, but people going to register—we had to find some other place to park.

Mr. Lillie: Nothing further, Your Honor.

Mr. Deasy: That is all, Mr. McMullen.

The Government rests.

Mr. Lillie: I would like to call one witness in rebuttal.

HERBERT D. WINDSOR, JR.

called as a witness on behalf of the plaintiff, sworn.

The Clerk: Will you state your name to the Court, please?

A. Herbert D. Windsor, Jr.

Direct Examination

By Mr. Lillie:

Q. How old are you, Mr. Windsor?

A. Twenty-two.

Q. Your mother and father preceded you on the stand? A. What?

Q. Your mother and father preceded you on the stand A. Yes.

Q. And they are plaintiffs in this action?

A. Yes.

Q. You heard their testimony? A. Yes.

Q. You understand the meaning of an oath?

A. Yes. [59]

Q. Do you recall the night of the accident in which your mother was injured and fell?

A. Yes.

Q. Now, will you tell me in what relation you, your mother and your father, as you observed, left the cafeteria on that night?

A. Well, my mother probably went out first. I don't remember that. I probably opened the door for her and she probably went out. I really don't remember that. I was in front of her down the steps. I went down the steps first.

Q. Which steps are you referring to?

(Testimony of Herbert D. Windsor, Jr.)

A. Well, the steps where she fell.

Q. You went down the steps first? A. Yes.

Q. How far away from her were you when she fell?

A. Oh, possibly 5 or 6 feet; maybe a lot more.

Q. Did you see her when she fell?

A. No, I heard her groan and I turned around. All I saw was a flash of it, but I couldn't really, I didn't really see her fall.

Q. At that time did you see——

A. Just a flash, and I turned around. She was lying face down on the ground.

Q. At that time did you see where your father was? A. Well, yes he was back behind.

Q. Behind what? [60]

A. Behind my mother, the other side of her.

Q. How far distant would you say?

A. Oh, 8 or 10 feet, probably.

Q. Did you hear any exclamation or your mother saying anything just prior to her falling?

A. No.

Q. And how far away from her were you at that time? A. 5 or 6 feet, probably.

Q. At any time did you hear her say anything to you or to your father in particular?

A. No, nothing whatsoever.

Q. You were no more than 5 or 6 feet ahead of her? A. That's right.

Mr. Lillie: That is all, your Honor.

Mr. Deasy: No questions.

Mr. Lillie: We rest, your Honor.

The Court: I don't need any argument about the facts. I need a memorandum from somebody about—from both sides, about these questions of law involved here. The responsibility of the United States Government—the government was apparently a lessor of this property extending to the outer boundary of that cement bulkhead.

Mr. Lillie: Yes, I am conversant with that fact.

The Court: Also the point that the Federal Tort Claims Act only covers claims of acts of some employee of the government [61] of the United States within the scope of its authority. Also the point that the lady was taking a short cut, not going where pedestrians should go. Also the point whether an employee of the United States had any duty to erect a handrail and building that bulkhead that way, or anything like that. Those legal matters I haven't had an opportunity to examine.

Mr. Lillie: Well, let me state——

The Court: I am not passing on them now, but suggesting there is where the doubts in my mind are created.

Mr. Lillie: I may be able to assist the Court in this respect, that I don't think there is any question as to lease. In reply to the Government, my position first of all is the lease was only offered to show the relationship of the parties as lessee and lessor. The Government owned the property. Secondly, that the management and control and upkeep of the

bulkhead and the step and the platform was devolved upon the——

The Court: Lessee.

Mr. Lillie: Lessee, and that the Government's duty under the lease was to care for the property and pavement from the edge of the cement block, which was the step at the bottom. In that respect, of course, it is going to be the plaintiff's contention in this brief is that you don't have to worry about the lease so far as the Court is concerned, and I think we can stipulate in that respect, can't we, counsel, that covered that porch? [62]

Mr. Deasy: Your pre-trial memorandum seemed to indicate that the lease puts upon the lessee the duty of maintaining the gutter. I didn't know——

Mr. Lillie: It puts upon the lessor the duty of maintaining the gutter. As a matter of fact, I think the specifications which were turned in indicates at one point where the Government has the duty of maintaining and where the lessee does.

But be that as it may, the plaintiff's contention will be this: that apparently on the theory where a person if they construct a buildnig or an article which would be in violation of a code, therefore, negligence per se, they can't avoid their liability on it by reason of a leasehold to someone else. If a third party becomes involved, primarily, at least, responsible for it and that was the basis of the introduction of the code.

The Court: Isn't there a general rule to the effect a building is leased entirely to the lessee, then

any injury occuring in that building, if the building is leased entirely to a lessee, that the lessee is liable for the negligent injury, not the lessor?

Mr. Lillie: Yes, that is right.

The Court: Because when they are at a place where they have common elevators, which is the obligation of the——

Mr. Lillie: Landlord.

The Court: ——landlord, then, of course, the landlord may be held under the proposition. [63]

Mr. Lillie: I think, what I am driving at is essentially this, Your Honor: I think that we will submit cases where a building is built in violation of the building code, and landlords subsequently rent it or lease it, the lessee assumes the obligation, where the courts hold the lessee is obligated for any neglect.

Mr. Deasy: I don't think that is the point here, Your Honor, for the reason: That there is no evidence the buildings here were constructed by the United States. As a matter of fact, they were not constructed by the United States, they were entirely constructed and being maintained ever since construction by the lessee. Because of the terms of the lease, that is the fact I am sure, Your Honor, it appears from the lease they have the right to build a building. The lease only provides for hotel accommodations and so forth, a very lengthy lease. I don't know if I can find it off-hand, but it is my understanding that the areas occupied by, and where there are concessions being run by the Yosemite

Park and Curry Company and leased as areas by the Company many years ago, and that the various hotel, camping and other facilities that are in existence there now, were erected by the lessee under this lease.

The Court: There is no evidence in this case; what is the fact on that? Can't you gentlemen stipulate? Is that what was done?

Mr. Lillie: I don't know, Your Honor, you have been saying—— [64]

The Court: The Government now says that the park company built the building.

Mr. Lillie: I presume that the Government did.

The Court: I assume that they did.

Mr. Lillie: I assume that they did, I have no knowledge, but I think we can get together.

The Court: If it was a lease of the land area.

Mr. Lillie: Yes.

The Court: That would be a different situation again.

Mr. Lillie: Yes, it would.

I want those facts before the Court if that was the fact but I don't think there is any question as to the maintenance of that gutter and that parkway in respect to the Government.

The Court: Trouble is, since this didn't occur in the gutter, it occurred because the woman fell down the steps.

Mr. Lillie: If that gutter had not been there, of course, it is the plaintiff's theory that the ankles wouldn't have been broken, if she had come down

on that ground, flat ground, where there was ground to support her heel, then there would have been no break. But it would be to my way of thinking nothing less than a trick to set a gutter right beside a step under those conditions. It is true that the act might have been started by the operation of that platform, of the defendant, the Yosemite Park Company. That has been dismissed, but it was concurred in by the Government in keeping that hazard there. [65]

The Court: According to Mrs. Windsor she broke one leg when she fell on the cement platform and then broke the other one—I understood her to say she felt that leg crack when she first went down on the cement platform, and felt the other crack when she fell in the gutter.

Mr. Lillie: If that is what the Court's understanding is, I would like to have the reporter read that portion and to see if it is different, because I would like to make a motion to reopen, because it is my understanding from what the plaintiff has told me that her first injury arose at the time her foot hit this asphalt ridge off the cement step on the ground in each instance. If the Court would like to, I can ask——

The Court: Put her on again.

Mr. Lillie: Mrs Windsor, will you step up here again?

The Court: Describe it all, Mrs. Windsor.

MRS. WINDSOR

Recalled:

By Mr. Lillie:

Q. What actually happened?

A. I came down—let's see——

Q. That is the wooden platform, this is the cement step, and this is—— (indicating)

A. This was where I was thrown off balance (indicating). Then I went down with my right foot on here, came down and hit my left foot here. This is where the left foot broke. I came down on the same kind of spot with my right foot and that is when it broke. I am quite sure I said that. [66]

Mr. Lillie: As she explained it, she was on the ball of her foot and her heel went back——

The Court: My notes aren't clear on that.

Mr. Lillie: I am glad that came up so we can clarify that. Any special time that Your Honor would like to give us?

The Court: Don't make these briefs too long. I understand what the facts are. How long do you want? Can you get your briefs in within ten days?

Mr. Lillie: Yes.

The Court: All right, the Government can have ten and you can have five for rebuttal.

The Clerk: This matter will appear on the calendar. It won't be necessary to appear again.

The Court: We will stand adjourned then, until 10 o'clock tomorrow morning. [67]

CERTIFICATE OF REPORTER

We, Official Reporters and Official Reporters pro tem, Certify that the foregoing transcript of 67 pages is a true and correct transcript of the matter therein contained as reported by us and thereafter reduced to typewriting, to the best of our ability.

/s/ KENNETH S. SAGAR.

/s/ RUSSELL D. NORTON.

[Endorsed]: No. 12468. United States Court of Appeals for the Ninth Circuit. Herbert Windsor and Baeda E. Windsor, husband and wife, Appellants, vs. United States of America, Appellee. Supplemental Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed March 16, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.